Petition

81-1091

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ALEXANDER L. STEVAS,
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EDGAR PAUK,

Petitioner,

—against—

THE BOARD OF TRUSTEES OF
THE CITY UNIVERSITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Where petitioner, a college professor, complained that he was denied tenure solely due to his exercise of free speech and union activities, but the Second Circuit Court of Appeals dismissed his § 1983 action as untimely because it was initiated more than three years from the time it allegedly accrued:

(1) Was it error for the Second Circuit Court of Appeals to apply to petitioner's § 1983 action the New York statute of limitations for a liability created by statute, even though this Court has held that § 1983 creates no liability, and even though state courts in New York and at least one federal court outside New York, have held that such statutes of limitations are not applicable for § 1983 Civil Rights actions?

(2) Was it error for the Second Circuit to hold that petitioner's cause of action

accrued before the decision to terminate his employment, and thus tenure, was final under state law?*

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* A complete listing of all respondents in the proceeding is as follows: The Board of Trustees of the City University of New York; The City of New York; Harold M. Jacobs, Patricia J. Carry Stewart, Loretta A. Conway, Walter H. Crowley, Armand D'Angelo, Edith B. Everett, Gurston D. Goldin, Albert V. Maniscalco, Joan B. Maynard, Emanuel R. Piore, Joaquin Rivera, David Z. Robinson, Ronald T. Gault and Jack J. Oliviero, members of the Board of Trustees of the City University of New York; Saul B. Cohen, Joseph S. Murphy, Nathaniel H. Siegel, Lola R. Locker, Albert M. Levenson, David H. Speidel, Seymour Goodman, Norman L. Goldman, Joel Mandelbaum, Henry W. Morton, William Hamovitch, Michael Studdert-Kennedy, Konrad Gries, John H. Reilly, Manuel Lloris, Seymour Resnick, Martin Nozick, Albert A. Sicroff, Rosette C. Lamont, Sergio Pacifici and Beatrice P. Patt, members or former members of the faculty at Queens College.

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"A Limitation of Actions for Deprivation of Federal Rights," 68 Columbia Law Review 763 (1968).

"Statutes of Limitations in Federal Civil Rights Litigation," 1976 Arizona State Law Journal 97 (1976).

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

EDGAR PAUK,

Petitioner,

- against -

THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Edgar Pauk prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on July 22, 1981.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 654 F.2d 856 and is set forth at Appendix A herein. The opinion of the District Court for the Eastern District of New York, dated October 14, 1980, is not reported and is set forth at Appendix B herein.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on July 22, 1981. Petitioner filed a timely motion for rehearing *in banc*, which was denied on September 11, 1981 in an order set forth at Appendix C herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The federal Constitutional provision involved is the Fourteenth Amendment to the United States Constitution. The federal statutory provision involved is 42 U.S.C. § 1983. The state statutory provisions involved are Sections 214(2), 213(1) and 213(2) of the New York Civil Practice Law and Rules. The text of those provisions is set forth at Appendix D herein.

Statement of the Case

From September 1, 1967 to August 31, 1976 petitioner was employed by Respondent Board of Trustees to teach in the Department of Romance Languages at Queens College. In September of 1975 petitioner's department

voted to recommend that petitioner be re-appointed for a sixth year in the position of assistant professor, and thus acquire statutory tenure. In October of 1975, however, a college committee made a negative recommendation to the College President, who invited petitioner to appeal. Petitioner's appeal alleged that the proposed denial of reappointment was caused solely by his exercise of the right of free speech and union activities. In November 1975, the College President rejected petitioner's appeal and he was notified by the Provost that his appointment at Queens College would end on August 31, 1976. Because it was the College President's custom not to forward negative recommendations to the Board, the Board had no occasion to, and did not act on the denial of petitioner's appointment with tenure.

On August 31, 1979* petitioner instituted this action pursuant to 42 U.S.C. § 1983, alleging the deprivation under color of state laws of rights secured to him by the Constitution of the United States. On

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* Although petitioner did not begin this action until three years after the end of his employment, in January 1976 (while still employed by the Board) he began a special proceeding in the nature of mandamus in state court. In that proceeding, he claimed tenure by estoppel because of the length of his service with the Board. In September 1977 Special Term granted his petition and ordered him reinstated with tenure. However, the Appellate Division reversed that decision and the reversal was affirmed by the Court of Appeals. Pauk v. Board of Higher Education, 62 App.Div.2d 660 (1st Dept. 1978) aff'd., 48 N.Y.2d 930 (1979). After petitioner began the action at bar, this Court reversed the Second Circuit's rule, which tolled the statute of limitations applicable to § 1983 actions pending actions or proceeding in state court vindicating no federal causes of action. See, Board of Regents v. Tomanio, 446 U.S. 478 (1980).

October 14, 1980, however, the United States District Court for the Eastern District of New York dismissed petitioner's action as untimely because initiated more than three years from the time his action accrued. The Court held that petitioner's action accrued in November 1975, when he was notified his employment would terminate on August 31, 1976. On July 22, 1981 the United States Circuit Court for the Second Circuit affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to settle the confusion, uncertainty and lack of uniformity which now exists with respect to the appropriate statute of limitations in civil rights cases under 42 U.S.C. 1983. This confusion results in burdening the lower federal (and state) courts who must, in the absence of guidelines from this Court,

attempt to fashion appropriate limitation periods, using widely varying methods of analysis and unfortunately coming to markedly different conclusions. Thus not only does the limitation period vary from circuit to circuit and from state to state (ranging from six months in Massachusetts (Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980), cert. den., _____ U.S. _____, 101 S. Ct. 256, 66 L.Ed.2d 121 (1980)) to six years in Pennsylvania (Skehan v. Board of Trustees, 590 F.2d 470 (3rd Cir. 1978), cert. den., 444 U.S. 832 (1979)), but often within the same state, depending on the facts of each action. Thus, in § 1983 actions within the same state, federal courts have applied state statute of limitations governing tort actions for personal injury, intentional torts, contract actions, state civil rights provisions, actions against public officials and actions

not otherwise provided for. See, Daniel E. Feld, "What Statute of Limitations Is Applicable to Civil Rights Action Brought Under 42 U.S.C. § 1983," 45 A.L.R. Fed. 548-586 and 1981 Later Case Service; "Statutes of Limitations in Federal Civil Rights Litigation," 1976 Arizona State Law Journal 97 (1976); "A Limitation of Actions for Deprivation of Federal Rights," 68 Columbia Law Review 763 (1968).

Furthermore, in at least one state, New York, state and federal courts differ in their method of analysis of a 1983 action, and thus resort to two different sets of periods of limitations, as discussed infra.

Adding to the confusion, in this and other cases, is the problem that while many courts apply the state statute of limitations for actions upon liability created by statute, this Court has recently held that 42 U.S.C.

1983 is not a statute creating liability. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

This confusion and perplexity also results in uncertainty and unfairness to litigants, like petitioner, required to guess what statute of limitations will apply to their cases. This Court in its supervisory capacity should definitively resolve this issue and establish clear guidelines with respect to the appropriate statute of limitations for Civil Rights Actions.

1. The mistaken application of the state statute of limitations for a liability created by statute to a §1983 cause of action disregards this Court's decision in Chapman that §1983 "does not provide any rights at all."

Congress has not established a statute of limitations applicable to actions brought under §1983. This Court has held, therefore, that a federal court must "borrow" the "state law of limitations governing an analogous cause of action." Board of Regents v. Tomanio, 446 U.S. 478 (1980), at 483; Johnson v. Railway Express Agency, 421 U.S. 454 (1975). In the case at bar, the Second Circuit undertook "to examine the limitations periods that New York has prescribed for various state causes of action and then select for §1983 claims, as a matter of federal law, the limitations period for an 'analogous' state cause of action." (A-19). It then held that "a state law

claim founded upon a statute is the appropriate analogy for a §1983 claim." Id. Thus, the Circuit Court applied to petitioner's action section 214(2) of the New York Civil Practice Law and Rules ("CPLR"), (McKinney's, 1972), which provides a three-year limit for

> an action to recover upon a liability, penalty or forfeiture created or imposed by statute.

This Court has held, however, that §1983 "does not provide any rights at all", but

> served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by §1 of the 1866 Act.

Chapman v. Houston Welfare Rights Org. ("Chapman"), 441 U.S. 600 (1979), at 617-618. As used in Chapman, "cause of action" means only that a §1983 plaintiff

> is a member of the class of litigants that may, as

> a matter of law, appropriately invoke the power of the Court.

Davis v. Passman, 442 U.S. 228 (1979), at 239, note 18. This Court has also held that, "one cannot go into court and claim a 'violation of §1983' - for §1983 by itself does not protect anyone against anything." Chapman, supra, 441 U.S. at 617.

It is axiomatic, therefore, that a statute like §1983 that "does not provide any rights at all", can create no corresponding liability. Thus CPLR 214(2) is not the appropriate state statute of limitations to be applied to §1983 actions based on the United States Constitution.

Because the Circuit Court could not distinguish the holding of Chapman, it chose to ignore that decision, and dwell instead upon all the reasons why it found it preferable to continue to apply CPLR 214(2) to the action

at bar. In his concurring opinion, Judge Sofaer criticized the majority for not facing up to Chapman, stating:

> A precise reading of Chapman spares us the need to engage in policy analysis that might suggest we are selecting a limitations period that we find convenient, rather than one squarely justified by state-law analogies.

(A-22)*

By disregarding the clear principles enunciated by this Court in Chapman, the Circuit Court compounds the confusion now present in the lower federal courts surrounding the applicable state statute of limitations for § 1983 actions.

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* The concurring opinion, however, provides no "precise reading of Chapman." It merely attempts to differentiate "creating" a liability from "imposing" a liability, in a Procrustean effort to fit the language of CPLR 214(2) within the holding of Chapman. For decisions differentiating the creating of a liability from the imposing of a penalty or forfeiture, see Sicolo v. Prudential Sav. Bank of Brooklyn, 5 N.Y.2d 254 (1959) and Meeker v. Lehigh Val. R. Co., 236 U.S. 412 (1915).

2. There is a conflict between the Circuit Courts as to whether, in light of Chapman, §1983 is a statute creating a liability.

The decision of the Circuit Court in its analysis of the effect of Chapman conflicts with a recent decision of the Fifth Circuit. The Fifth Circuit has recently held that, in light of Chapman, a §1983 action based on the Constitution was not one "for the enforcement of rights accruing to individuals under statutes," and thus declined to apply the Georgia twenty-year statute of limitations applicable to the enforcement of rights accruing under statutes. It applied, instead, the two-year limitation period for "actions for injuries to the person," to an action where plaintiff had complained of "irregularities surrounding his arrest." McMillian v. City of Rockmart, 653 F.2d 907 (5th Cir., Unit B, 1981).

The Fifth Circuit is the only court,

state or federal, outside New York to consider the continued applicability of a period of limitations for liabilities created by, or accruing under a statute in light of Chapman. However, the issue is bound to be raised whenever a similar state statute of limitations has heretofore been held applicable to §1983 actions under the Constitution.* This Court should provide guidance to avoid compounding the confusion and uncertainty which are bound to increase on this important issue.

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* State statutes of limitations governing actions to recover upon liabilities created by statute were held applicable to §1983 actions by federal courts within the following circuits. 2nd Cir.: New York; 4th Cir.: North Carolina; 5th Cir.: Texas, Florida, Alabama; 6th Cir.: Kentucky; 7th Cir.: Wisconsin; 8th Cir.: Arkansas, Nebraska; 9th Cir.: California, Montana, Nevada, Idaho, Oregon; 10th Cir.: Colorado, Wyoming. 45 A.L.R. Fed. 548-586.

3. The Circuit Court's holding conflicts with New York precedent.

A. Applicability of CPLR 214(2)

Section 214(2) has been held inapplicable by New York courts to a statute which, "in regulating a substantive right or the procedure for its enforcement does not create or impose a liability, penalty or forfeiture." State v. Cortelle Corp. ("Cortelle"), 38 N.Y. 2d 83 (1975), at 89. The Court stated: "The statute may limit or broaden the remedy, even define its exercise and by whom, but it did not create or impose a liability, penalty or forfeiture in the sense of CPLR 214." Cortelle, supra, 38 N.Y. 2d at 88. A fair reading of this Court's decision in Chapman and of the New York Court of Appeals' decision in Cortelle, compels the conclusion that, under New York State law, CPLR 214(2) is not applicable to a §1983 action. As held by this Court in Tomanio, supra, 446 U.S. at 484, in §1983 actions state statutes of

limitations are "more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law" which 42 U.S.C. §1988 "authorizes federal courts to disregard ... only if the state law is inconsistent with the Constitution and laws of the United States." Tomanio, supra, 446 U.S. at 484-485.

B. Accrual of the cause of action

This Court has recently settled the issue of the accrual of an employment discrimination cause of action in an academic setting, where notice of termination of employment precedes actual termination by several months or even years. See Delaware State College v. Ricks, ("Ricks"), ____U.S.____, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980)(42 U.S.C. § 1981) and Chardon v. Fernandez ("Chardon"), 50 U.S.L.W. 3341 (November 3, 1981) (42 U.S.C. § 1983). In those decisions this Court held that "limitation

periods normally commence when the employer's decision is made." Ricks, supra, 66 L.Ed.2d at 442. (Emphasis added). In Ricks the Court essentially held that, when the Board of Trustees voted to deny plaintiff tenure, by that vote "the College had established its official position." Ricks, supra, 66 L.Ed.2d at 442. Thus, the termination of employment was only "a delayed, but inevitable, consequence of the denial of tenure." Ricks, supra, 66 L.E.2d at 439. Similarly, in Chardon this Court held that plaintiffs' cause of action accrued when a "final decision had been made" to terminate their employment. Chardon, supra, 50 U.S.L.W. at 3342. (Emphasis added). It is clear, therefore, that under the standards enunciated by this Court, a cause of action for employment discrimination accrues when the employer makes a final decision.

In the case at bar, under New York law,

petitioner's employer was not the President of Queens College, but the Board of Trustees of the City University of New York. It is undisputed that said Board never acted to terminate plaintiff's appointment. Because the Board's time to act did not expire until August 31, 1976, there was no final decision prior to that date regarding the termination of petitioner's employment. On the authority of Ricks and Chardon, petitioner's § 1983 cause of action, therefore, did not accrue until a final decision was made by default on August 31, 1976, and this action, initiated within three years of that date, was timely.

4. Decisions of New York state courts and New York federal courts conflict on the period of limitations applicable to a § 1983 action.

Two New York courts so far have considered the continued applicability of CPLR 214(2) to a § 1983 action in the light of Chapman, and both have come to the conclusion that CPLR 214(2) no longer applies to such an action. Staffen v. City of Rochester ("Staffen"), 80 App. Div. 2d 16 (4th Dept. 1981); Pitt v. City of New York, (Sup. Ct., N.Y.Co., Greenfield, J.), New York Law Journal, November 18, 1981, p. 4, col. 4 ("Pitt"). As a consequence of the Circuit Court's disregard of this Court's holding in Chapman, there are now two sets of statutes of limitations applicable in New York to the same § 1983 action. Which set is chosen depends entirely on whether the action is brought in state court or federal court.

In federal court, all § 1983 actions are mistakenly characterized as actions "to recover upon a liability created by statute," and governed by CPLR 214(2) (3 years). In state court instead, "it is the gravamen or essence of the cause of action that determines the applicable Statute of Limitations." Western Elec. Co. v. Brenner, 41 N.Y. 2d 291 (1977), at 293. Therefore, each § 1983 claim must be individually examined in order to determine its "gravamen or essence" and then the relevant period of limitations applied to it. Thus, in Staffen, after examining the cause of action, the court held that the particular § 1983 action was "a tort action against police officers to [sic] whom the municipality has a duty to indemnify," and applied the one-year and 90-day statute of limitations of section 50-i of the General Municipal Law. In Pitt, the Court held that the essence of the cause of action was

assault and battery, and applied to it CPLR 215(3) (one year), dismissing the action as untimely.

If petitioner had brought this action in state, rather than federal court, his action would have been characterized as contractual because it arose out of an employment relationship. Thus, the state court would have applied to it CPLR 213(2), the six-year statute of limitations governing actions in contract.* See, Western Electric

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* As summarized by the Circuit Court, it is plaintiff's contention that his contract with the Board in addition to its express terms, "includes all rights conferred by New York law, which requires promotions in the civil service to be made according to merit, N. Y. Const., Art. V, § 6, and that denial of tenure because of his exercise of First Amendment rights was unrelated to merit and therefore breached his contract." (A-13). CPLR 213(2) is set forth at A-48.

v. Brenner, 41 N.Y.2d 29 (1977); Sears, Roebuck & Co. v. Enco Assoc., Inc., 43 N.Y.2d 398 (1977). Alternatively, a state court would have characterized petitioner's action as arising under the Constitution, rather than a statute, and applied to it CPLR 213(1), the six-year residual statute of limitations. See, Clark v. Water Commissioners, 148 N.Y.1 (1895).* It is difficult to conceive of a

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* As noted by the Circuit Court, the "sensible but difficult conclusion" reached by the District Court that the United States Constitution was a statute for purposes of CPLR 214(2),

> has implicitly been rejected by the New York courts, to which we are supposed to look for guidance as to the appropriate statute of limitations.

Circuit Court (Concurring Opinion) (A-22). New York is not the only state to distinguish between a liability created by statute, and one created by the Constitution in the application of a statute of limitations. See, e.g., Marshall v. Kleppe, 637 F.2d 1217, 1222-1224 (9th Cir. 1981) (California) and Beard v. Robinson, 563 F.2d 331, 334-338 (7th Cir. 1977) (Illinois), cert. den., 438 U.S. 907 (1978).

period of limitations more appropriate to the vindication of rights secured by the Fourteenth Amendment than the six-year period of limitations applied by New York state courts to vindicate rights secured by the New York State Constitution.

Regardless of whether a state court would characterize petitioner's action as one in contract or one to vindicate constitutional rights, neither characterization should be rejected lightly because, as this Court has held,

> there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with [federal] policy.

International U., U.A., A. & A.I.W. v. Hoosier C. Corp., 383 U.S. 696 (1966), at 706. (Emphasis added).

It is clearly not in the best interest of the Constitutional rights, whose vendication § 1983 was meant to authorize, to have

a dual set of limitation statutes applicable in state and federal courts located in the same state and purporting to apply the same state law. This is particularly true where there is no allegation that the characterization applied by state courts is "unreasonable or otherwise inconsistent with [federal] policy." This Court should put an end to this dual set of limitation periods, by clarifying which is the correct method of characterizing a § 1983 action for purposes of applying to it the appropriate state statute of limitations.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: December 7, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 877—September Term, 1980

(Argued April 6, 1981 Decided July 22, 1981)

Docket No. 80-9018

EDGAR PAUK,

Plaintiff-Appellant,

—v.—

THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants-Appellees.

Before:

TIMBERS and NEWMAN, *Circuit Judges,* and SOFAER*, *District Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Jacob Mish-

* The Honorable Abraham D. Sofaer of the United States District Court for the Southern District of New York, sitting by designation.

ler, Judge) dismissing appellant's action under 42 U.S.C. § 1983 as time barred.

Affirmed.

JONATHAN A. WEISS, New York, N.Y. (Oscar Chase and Edgar Pauk, New York, N.Y., on the brief), *for appellant*.

EDWARD F.X. HART, New York, N.Y. (Allen G. Schwartz, Corp. Counsel, and Ronald E. Sternberg, New York N.Y., on the brief), *for appellees*.

NEWMAN, *Circuit Judge*:

This appeal concerns the recurring issue of determining the appropriate statute of limitations under New York law for actions commenced under 42 U.S.C. § 1983 (1976). The District Court for the Eastern District of New York (Jacob Mishler, Judge), applying New York's three-year limitations period for liability created or imposed by statute, N.Y. Civ. Prac. Law and Rules (CPLR) § 214(2) (McKinney 1972), dismissed appellant's claim as time barred. We affirm, concluding that § 214(2) is the New York limitations provision that best fulfills the federal policies underlying § 1983 actions.

Appellant Edgar Pauk became an Assistant Professor in the Department of Romance Languages of Queens College of the City University of New York in the Fall of 1970 after serving as a Lecturer for the three preceding years. Under New York law, tenure is automatically conferred within the City University when an individual

has served full-time as an Assistant Professor for five continuous years and is reappointed for a sixth consecutive year. N.Y. Educ. Law § 6212(3) (McKinney Supp. 1980) (formerly N.Y. Educ. Law § 6206(3)). On September 24, 1975, after five years of full-time service,[1] Pauk was informed by his Department that it had voted to recommend him for reappointment with tenure and was submitting its recommendation to the College Personnel and Budget Committee. However, on October 24, 1975, Pauk was notified by the President of the College that the Committee had voted against his reappointment.

In this letter, the President indicated that he would entertain an appeal of the Committee's determination based on either information that had been unavailable to the Committee, or credible allegations that the Committee had considered non-academic matters. Pauk appealed, outlining his academic credentials, and alleging that he had been denied reappointment because of his union activities. On November 14, 1975, the President denied Pauk's appeal, and shortly thereafter, on November 24, 1975, Pauk was notified by the Provost that his appointment terminated on the final day of his existing one-year contract, August 31, 1976. Pauk's tenure application was not considered by the University Board of Trustees because it was the Board's practice to act on tenure matters only when positive tenure recommendations were made.

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[1] Though Pauk was appointed to the faculty for six years prior to the action on his tenure, in 1971-1972 he was on leave of absence without pay from all of his teaching responsibilities in order to work for the faculty union. The New York courts held that the tenure statute, N.Y. Educ. Law § 6206(3) (now § 6212 (3)), required five years of full-time *service*, not simply appointment, as a teacher and consequently that Pauk had not already acquired tenure by having been reappointed to a sixth year. *Pauk v. Board of Higher Educ.*, 62 A.D.2d 660, 406 N.Y.S.2d 46 (1st Dep't 1978), *aff'd* 48 N.Y.2d 930, 425 N.Y.S.2d 92 (1979).

On January 7, 1976, Pauk challenged the denial of his reappointment by filing a grievance in accordance with the collective bargaining agreement between the Board of Higher Education (now the Board of Trustees of the City University of New York) and the faculty union, the Professional Staff Congress. Under this agreement, grievances were submitted to an arbitrator empowered to rule only whether the challenged decision was procedurally defective. If the arbitrator so ruled, the matter was referred to a select faculty committee to reconsider the decision and make a recommendation to the Board. Rather than pursue this path, Pauk withdrew his grievance one month after filing it. In the interim, he commenced an Article 78 proceeding in New York state court, CPLR § 7801, *et seq.* (McKinney 1981), alleging that his dismissal was improper since he had in fact obtained tenure, counting either the three years in which he taught in the capacity of a lecturer, or the one year during which he was on leave of absence without pay from any teaching duties. This petition was ultimately rejected by the New York Court of Appeals in 1979. *Pauk v. Board of Higher Education,* 48 N.Y.2d 930, 425 N.Y.S.2d 92 (1979), *aff'g* 62 A.D.2d 660, 406 N.Y.S.2d 46 (1st Dep't 1978). On August 31, 1979, three years after the termination of his employment contract, and three years and nine months after notification of both the tenure denial and his discharge date, Pauk filed this action under 42 U.S.C. § 1983, alleging that the College and City education officials had deprived him of First Amendment rights by denying him reappointment with tenure in retaliation for his active participation in the faculty union.

The District Court granted appellees' motion to dismiss the complaint on the grounds that Pauk's action was time barred. The Court determined that Pauk's claim had

accrued in November 1975 when he received notification of the tenure denial and his discharge date. The Court then applied the three-year limitations period of CPLR § 214(2) for liability created or imposed by statute. We agree with both conclusions of the District Court.

Accrual

Federal law determines when a claim accrues under § 1983. *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, ____ U.S. ____ (1981). In *Singleton*, following the Fourth Circuit's approach in *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979), we held that the federal claim accrues when the plaintiff "knows or has reason to know" of the injury that is the basis of his action. 632 F.2d at 191. Pauk knew of his injury, the alleged improper denial of tenure, on November 24, 1975, when he received notice of termination of his employment from the Provost following the President's denial of his appeal. He contends, however, that his right of action did not accrue until August 31, 1976, the date of his actual discharge, because the letters he received in November did not represent final action on his tenure application, action that he alleges could be taken only by the Board of Trustees of the University.[2]

In *Delaware State College v. Ricks*, ____ U.S. ____ (Dec. 15, 1980), the Supreme Court held that the date of accrual of a claim alleging that the plaintiff was denied tenure because of his national origin in violation of 42

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2 We reject Pauk's theory that no "deprivation" occurred under § 1983 until his employment actually terminated. The alleged deprivation violating Pauk's constitutional rights was not the fact of his discharge but the denial of reappointment with tenure, allegedly based on Pauk's protected First Amendment conduct.

U.S.C. § 1981 (1976) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), was the date on which the plaintiff had received notice of the negative tenure decision and not the date of his actual termination. Appellant seeks to distinguish *Ricks* on factual grounds, contending that, unlike the circumstances of this case, there was clear evidence of the decision's finality in *Ricks* because the Board of Trustees of Delaware State College had both reviewed the faculty tenure decision and sent the notification letter to Ricks.[3]

The gist of appellant's claim is that under New York law the Board of Trustees cannot delegate its decisional authority with respect to academic matters such as tenure, and that the negative tenure determination by the College

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3 Appellant also contends that *Ricks* is inapplicable because of the difference in the federal statutes on which the claims rest, citing this Court's statement in *Singleton v. City of New York*, 632 F.2d 185, 191 n.5 (2d Cir. 1980), *cert. denied*, ___ U.S. ___ (1981), that in a single § 1983 action relying on several claims for relief, the individual claims need not all accrue on the same date. We disagree with appellant as to the import of our remark in *Singleton*; we simply expressed the common sense view that accrual dates for different *types* of claims may vary, and did not suggest that the federal rule for determining when a particular type of claim accrues should vary according to the federal statute under which it is brought. We think it appropriate to follow the Supreme Court's approach to the time of accrual of a claim involving a denial of tenure under 42 U.S.C. § 1981 (1976) in this action brought under 42 U.S.C. § 1983 (1976). *Cf. Bratton v. Bethlehem Steel Corp.*, 24 Empl. Prac. Dec. (CCH) ¶ 31,290 (9th Cir. 1980) (same rationale for choosing statute of limitations under § 1983 applies to § 1981); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 293 (D. Del. 1975) (same).

Nor is appellant's claim aided by *Fernandez v. Chardon*, No. 80-1237, ___ F.2d ___ (1st Cir. May 8, 1981). *Fernandez* held that a § 1983 claim for wrongful discharge from government employment accrued at the time of discharge, rather than receipt of notice of the discharge decision. Whether or not we would agree with *Fernandez* in the context of a discharge from non-academic government employment, we note that *Fernandez* distinguished *Ricks* on the ground that Ricks, like Pauk, was alleging an unlawful denial of tenure, not a discharge.

Committee and the President therefore lacked binding authority without the Board's approval. Pauk maintains that since these decisions were not "final," his claim did not accrue until his actual discharge, when he no longer qualified under the tenure statute's continuous full-time service requirement. We disagree.

New York courts have held that the Board has a "nondelegable duty" to decide faculty appointments, promotion, and tenure, *Rodriguez-Abad v. Kibee,* 71 A.D.2d 588, 418 N.Y.S.2d 430 (1st Dep't 1979); *Aptekar v. Board of Higher Education,* 66 A.D.2d 630, 414 N.Y.S.2d 156 (1st Dep't 1979); *Legislative Conference of City University v. Board of Higher Education,* 38 A.D.2d 478, 330 N.Y.S.2d 688 (1st Dep't), *aff'd,* 31 N.Y.2d 926, 340 N.Y.S.2d 924 (1972); *see Professional Staff Congress/ CUNY v. City University of New York,* 507 F. Supp. 637 (S.D.N.Y. 1981). But the context of these rulings is quite distinct: at issue was the Board's ability to *reject* a faculty committee's positive recommendation of tenure. The courts uniformly concluded that the committee recommendations did not bind the Board because the Board's authority to *grant* tenure was not delegable. In *Rodriguez-Abad,* the Appellate Division further held that when a select committee established in accordance with the collective bargaining agreement's arbitration procedures voted to recommend an individual for tenure, the President could not veto that determination on his own but had to pass the recommendation on to the Board for its review. We do not find in these rulings a requirement that the Board independently review all negative tenure decisions. The Board's only nondelegable duty concerning tenure under New York law is to review recommendations for tenure supported throughout the administrative process or committee recommendations following a prop-

erly filed grievance even if disapproved during the administrative process.

There was no occasion for Board review of the denial of Pauk's tenure because the administrative process did not result in a favorable recommendation and Pauk withdrew from the grievance procedure which the New York courts have found to require ultimate Board review. Since appellant chose not to pursue the grievance procedure, the letters of notification he received from the President and Provost constituted final university action rejecting his tenure application. Pauk's discharge following receipt of those letters was simply the "inevitable consequence" of the adverse tenure decision previously made by the College just like the plaintiff's discharge following the trustees' notification letter in *Ricks.* ____ U.S. at ____. We see no basis for distinguishing appellant's case from *Ricks.* Since the Board did not delegate any duty in this case, we affirm the District Judge's ruling that appellant's federal claim accrued as of November 24, 1975, the date he received final notice of his discharge.

Statute of Limitations

Because Congress has not provided a federal statute of limitations for actions brought under § 1983, we must apply the most appropriate state statute of limitations. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980); *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975). We have previously held that the appropriate statute of limitations for § 1983 actions brought in New York is CPLR § 214(2), which specifies a three-year limitations period for actions to recover upon a liability created or imposed by statute. *E.g., Singleton v. City of New York, supra,* 632 F.2d at 190; *Taylor v. Mayone,* 626 F.2d 247, 253 (2d Cir. 1980); *Quinn v. Syracuse Model*

Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980); *Meyer v. Frank*, 550 F.2d 726, 728 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977). Appellant asks us to abandon these holdings in light of the Supreme Court's decision in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618 (1979), which held that § 1983 does not create any substantive rights and is only a remedial statute. Since § 214(2) does not apply to actions founded upon statutes that provide only additional remedies and do not create or impose new obligations, *State v. Cortelle Corp.*, 38 N.Y.2d 83, 85-86, 378 N.Y.S.2d 654, 655-56 (1975), the continued application of § 214(2) to § 1983 actions after *Chapman* must be reexamined, as we have previously recognized. *See Singleton v. City of New York*, *supra*, 632 F.2d at 190; *Taylor v. Mayone*, *supra*, 626 F.2d at 251 n.4; *Quinn v. Syracuse Model Neighborhood Corp.*, *supra*, 613 F.2d at 449 n.6.

The issue is squarely presented in this case because, unlike the claims of the plaintiffs in *Taylor* and *Quinn*, Pauk's claim is untimely if § 214(2) applies. And, unlike the plaintiff in *Singleton*, Pauk specifically urges rejection of § 214(2) in favor of the longer six-year limitations period provided by either CPLR § 213(2) (McKinney 1972), applicable to contract actions, or § 213(1), New York's residual statute of limitations. Appellees agree with Pauk that we should abandon application of § 214(2) in light of *Chapman*, but urge a much shorter limitations period, either the one-year-and-ninety-day limitations period for actions against a city or its employees, N.Y. Gen. Mun. Law §§ 50-i, 50-k (6) (McKinney 1977 & Supp. 1980), or the four-month limitations period for Article 78 actions, CPLR § 217 (McKinney 1972). We agree with Judge Mishler that, even after *Chapman*, § 214(2) is the most appropriate New York statute of limitations for § 1983 actions.

In reexamining the continued application of § 214(2) to § 1983 actions, we confront two realities: the body of our prior case law that has rejected limitations periods shorter than the three years specified by § 214(2) and the inexact fit of any of New York's statutues of limitations to § 1983 actions. Application of the one-year-and-ninety-day period of § 50-i of the General Municipal Law was specifically rejected in *Taylor v. Mayone, supra,* and *Quinn v. Syracuse Model Neighborhood Corp., supra.* Admittedly, these decisions rejected § 50-i in favor of possibilities that included § 214(2), whose applicability is now in issue, but they retain significance nonetheless. Both *Taylor* and *Quinn* acknowledged the possible impact of *Chapman* and *Cortelle* upon § 214(2) and rejected § 50-i in favor of *either* § 214(2) *or* § 213(1), the six-year residual statute of limitations. Selection between these statutes was not necessary since the claims were timely under even the three-year statute. Nevertheless, the force of the rejection of a shorter limitations period remains, a result that seems to have been tacitly influenced by concern that a relatively short limitations period would not be consistent with the broad remedial purposes of § 1983. *See Shouse v. Pierce County,* 559 F.2d 1142, 1146 (9th Cir. 1977) *(per curiam). Taylor* and *Quinn* are additionally pertinent in their disapproval of selecting different limitations periods for different classes of defendants. The interest in attaining some uniformity, at least within one state, concerning the limitations period for § 1983 actions has been widely noted. *See Walden, III, Inc. v. Rhode Island,* 576 F.2d 945, 947 (1st Cir. 1978); *Beard v. Robinson,* 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978), *Smith v. Cremins,* 308 F.2d 187, 190 (9th Cir. 1962); Note, *Statutes of Limitations in Federal Civil Rights Litigation,* 1976 Ariz. St. L.J. 97 (1976).

Even if we were to consider the applicability of § 50-i as an original question, we would be reluctant to select it for § 1983 actions. Section 50-i applies to suits "for personal injury or damage to real or personal property" caused by the negligence or wrongful acts of a city or its employees. The quoted terms fit precisely actions seeking redress for injuries of the sort that result from common law torts. A § 1983 suit, remedying what is sometimes called a constitutional tort, affords redress for "a deprivation . . . significantly different from and more serious than . . . a state tort." *Monroe v. Pape,* 365 U.S. 167, 196 (Harlan, J., concurring). Moreover, § 50-i represents a New York policy to provide more restrictive remedies against municipal employees for their torts than are available against private citizens, for whom the limitations period for unintentional torts is three years. CPLR § 214(5) (McKinney 1972). It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights. Finally, the brevity of the period prescribed by § 50-i is of doubtful compatability with the purposes of § 1983. A federal court, searching for an analogous state limitations period for a § 1983 suit, should not select any period shorter than the two years Congress has specified as the time within which notice must be given of claims against the United States for unlawful actions by federal law enforcement officers. 28 U.S.C. §§ 1346(b), 2680(h) (1976). That expression of federal policy should establish a floor for the limitations period of § 1983 suits, so many of which concern similar conduct by state law enforcement officers. *Cf. Regan v. Sullivan,* 557 F.2d 300 (2d Cir. 1977), adopting three-year

period of CPLR § 214(2) or six-year period of CPLR § 213(1) to suits against federal law enforcement officers brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The same considerations that render § 50-i inappropriate as the limitations period for § 1983 actions also apply to appellees' suggestion that we should adopt the one-year-and-ninety-day period provided by § 50-k(6) for actions against certain employees of New York City. In enacting § 50-k(6) the New York legislature explicitly purported to apply the one-year-and-ninety-day limitations period to § 1983 suits, as well as all suits brought pursuant to 42 U.S.C. §§ 1981-1988 against the designated class of New York City employees. But, as appellant points out, § 50-k(6), as enacted, did not apply to employees of a board of education, § 50-k(1)(a) and (e), and although § 50-k(6) was purportedly amended to cover New York City educational employees by an amendment to Education Law § 6211, Ch. 673, § 11, Laws of 1979, that amendment was ineffective, having occurred after § 6211 had been repealed by Ch. 305, Laws of 1979. Moreover, the inappropriateness of adopting different limitations periods for different classes of defendants in § 1983 suits makes it highly undesirable to select different limitations periods for defendants occupying similar positions in different cities within a single state.

Appellees also suggest that the appropriate limitations period is the four months provided by CPLR § 217 for proceedings brought pursuant to Article 78 of the CPLR. The brevity of that period makes it singularly inappropriate for § 1983 actions. Moreover, even if an Article 78 proceeding is available for appellant's constitutional challenge to the denial of his tenure, there is no reason to

believe that New York regards this procedure as the exclusive means for pursuing such a claim. Article 78 proceedings, though frequently brought, retain their basic nature as the modern procedural device for obtaining relief previously sought by specialized writs of certiorari for review, mandamus, or prohibition. CPLR § 7801. Such writs are not analogous to § 1983 actions.

Appellant not only opposes appellees' suggestions but urges a limitations period longer than the three years provided by § 214(2). He contends that the appropriate period is the six years provided by either § 213(2), applicable to contract actions, or § 213(1), the residual statute of limitations. The argument for § 213(2) proceeds from appellant's contention that his contract with the Board of Education includes all rights conferred by New York law, which requires promotions in the civil service to be made according to merit, N.Y. Const., Art. V, § 6, and that denial of tenure because of his exercise of First Amendment rights was unrelated to merit and therefore breached his contract. But appellant is not suing for breach of contract; he is suing under § 1983 for the constitutional tort alleged to have occurred when his tenure application was rejected in violation of his First Amendment rights. Under New York law, when a contract simply incorporates preexisting obligations independent of the contract, the applicable statute of limitations is not the period for contract actions but the period appropriate to the nature of the cause of action. *Union Bank of Switzerland v. HS Equities, Inc.*, 423 F. Supp. 927 (S.D.N.Y. 1976); *see Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 147-48 (1953). The Supreme Court recently declined to apply § 213(2) to a New York suit nominally brought for breach of a collective bargaining agreement because the essence of the claim was an attempt to set aside an

arbitration award. *United Parcel Service, Inc. v. Mitchell,* ____ U.S. ____ (Apr. 20, 1981). The Court therefore applied the ninety-day limitations period applicable to a claim of that type, CPLR § 7511(a) (McKinney 1963). For these reasons § 213(2) does not apply to appellant's suit.

Appellant's argument for application of § 213(1), the residual limitations period, rests on the assumption that we will no longer apply § 214(2) and the apprehension tthat we will not accept his argument for § 213(2). Appellees, sharing appellant's view that § 214(2) no longer applies, urge us to reject § 213(1) as well. In *Singleton v. City of New York, supra,* we observed that § 213(1), though phrased as applying to "an action for which no limitation period is specifically prescribed by law," has generally been understood to govern only actions for equitable relief. *Id.* at 190.[4] We have also declined to apply the residual limitations period to a suit seeking an equitable remedy when an action at law was available. *Swan v. Board of Higher Education,* 319 F.2d 56, 60 (2d Cir. 1963); *cf. Romer v. Leary,* 425 F.2d 186 (2d Cir. 1970); *see also Williams v. Walsh,* 558 F.2d 667 (2d Cir.

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[4] *Singleton* may have overemphasized the significance of the materials relied on for this conclusion. First, the opinion noted that the Practice Commentaries to § 213(1) state that the residual six-year period "governs actions in equity." 632 F.2d at 190. That view is not inconsistent with the applicability of § 213(1) to at least some actions at law, unless it is assumed that every action at law is governed by one of the specific statutes of limitations. *But see Clark v. Water Commissioners,* 148 N.Y. 1, 108 N.Y.S. 427 (1895). Second, the opinion cited legislative history stating that § 213(1) is applicable to " 'such equity actions as an action to reform an instrument, or any other action where no period is expressly prescribed.' " 632 F.2d at 190 n.4, *quoting* Leg. Doc. Vol. 1, No. 13, 181st Sess. at 67 (1958). The reference to "any other action" may well include some actions at law, rather than mean only other equity actions. Such is the view of at least one group of commentators. 1 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 213.01 (1977) ("Aside from its use as the 'residual' provision, CPLR 213(1) is applied in actions in which equitable relief is sought.").

1977). Appellant, in addition to seeking reinstatement, has presented claims for back pay, compensatory damages, and punitive damages. Notwithstanding the legal nature of at least some of his claims, appellant urges the application of § 213(1) for two reasons. First, he questions *Singleton's* limitation of § 213(1) to equitable actions, pointing out that the statute has at least once been applied to an action at law. *Clark v. Water Commissioners,* 148 N.Y. 1, 108 N.Y.S. 427 (1895) (predecessor of § 213(1) applied to action for compensation for taking of property). Second, he urges that § 213(1) applies even when a legal claim is available as long as the equitable claim being pursued is not in aid of the legal claim. *See Russell v. Todd,* 309 U.S. 280 (1940); 1 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 213.01 (1977). The substantiality of the issues raised by both sides concerning the applicability of § 213(1) suggests that before resolving them we should first more closely examine the premise on which both sides have proceeded: that the limitations period of § 214(2), applicable to claims founded on a statute, is no longer appropriate for § 1983 suits.

Even after *Chapman* and *Cortelle,* there remains room for argument that § 1983 is a statute within the category described by § 214(2). The argument requires examination of both *Cortelle* and the function of § 1983. *Cortelle* declined to apply § 214(2) to an action brought by the Attorney General of New York, pursuant to § 1101(a)(2) of the Business Corporation Law (McKinney 1963) and § 63(12) of the Executive Law (McKinney 1972), to enjoin fraudulent practices of corporations and their officers. The Court of Appeals noted that the statutes authorizing the Attorney General to sue did not make the defendants' practices unlawful and that statutes providing "only addi-

tional remedies or standing" are not statutes that create or impose liabilities within the meaning of § 214(2). 38 N.Y.2d at 85, 378 N.Y.S.2d at 655. Section 1983 is plainly not a statute that makes anyone's conduct unlawful, but neither is it a statute that provides only "additional" remedies for well-established liabilities. In the absence of § 1983, those who transgress constitutional commands would be liable for damages only on the basis of an implied cause of action grounded directly on the Constitution. While such liability has been recognized, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (Fourth Amendment); *Turpin v. Mailet,* 579 F.2d 152 (2d Cir.) (*en banc*) (Fourth Amendment liability of municipality), *vacated and remanded for reconsideration sub nom. City of West Haven v. Turpin,* 439 U.S. 974 (1978); *Paton v. LePrade,* 524 F.2d 862, 869-70 (3d Cir. 1975) (First Amendment), it surely is not as "old and common" as the liability for fraud that predated the statutes authorizing the state Attorney General's suit in *Cortelle.* 38 N.Y.2d at 86, 378 N.Y.S.2d at 657. Section 1983 can hardly be said to supply an "additional" remedy when, for the 100 years after its enactment in 1871 until *Bivens* was decided in 1971, it was the only means recognized for imposing damage liability specifically for violations of the Constitution. Moreover, when § 1983 provides a remedy, an implied cause of action grounded on the Constitution is not available. *Turpin v. Mailet,* 591 F.2d 426 (2d Cir. 1979) (*en banc*) (rejecting cause of action against municipality grounded directly on Constitution because of availability of § 1983 after *Monell v. Department of Social Services,* 436 U.S. 658 (1978)). In light of the primacy of § 1983 in providing the basis for securing redress for constitutional violations, we cannot be certain that the

New York Court of Appeals would decline to view it as a statute within the category to which § 214(2) applies.

Alternatively, it is possible to apply § 214(2) directly to § 1983 claims, as Judge Mishler did, on the rationale that the United States Constitution, on which appellant's claim is founded, should be considered a statute for purposes of § 214(2). Other courts have adopted this rationale in applying local versions of § 214(2) to suits based on constitutional claims. *De Malherbe v. International Union of Elevator Constructors,* 449 F. Supp. 1335, 1350 (N.D. Cal. 1978) (U.S. Constitution); *Santa Cruz County v. McKnight,* 20 Ariz. 103, 111, 77 P. 256, 259 (1918) (Arizona Constitution). Moreover, in *Regan v. Sullivan, supra,* we identified § 214(2) as one of two statutes of limitations (along with § 213 (1)) that might be applicable to claims founded directly on the Constitution pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra.*

Arguably opposed to this construction is *Clark v. Water Commissioners, supra,* in which the New York Court of Appeals ruled that the predecessor of § 214(2) was inapplicable to a claim for compensation for a public taking of property. However, *Clark* appears to involve a claim based on the state constitution.[5] More pertinent is a

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[5] The pertinence of *Clark* to § 1983 claims is rendered doubtful by comparing the nature of the statute at issue in *Clark* and the nature of § 1983. The statute under which the plaintiff sued in *Clark* in no sense created or imposed a liability. It merely established the procedural steps for obtaining compensation in the special context of condemnation authority exercised by the village of Amsterdam. N.Y. Laws of 1881, Ch. 101. The statute extended to the village the condemning power normally exercised by the State. Well-established prior law, as traditional as the liability for fraud that preceded the additional statutory remedy in *Cortelle,* assured the plaintiff in *Clark* his right to secure just compensation for any public taking of his property. Section 1983, as discussed in the text, *supra,* though not creating a right, has far more significance in providing the fundamental basis for damage liability than the statute under which suit was brought in *Clark.*

recent decision of the Appellate Division explicitly ruling that, in light of *Chapman* and *Cortelle*, § 214(2) does not apply to a § 1983 claim brought in state court against a municipality and its police officers. *Staffen v. City of Rochester*, 80 App. Div. 2d 16, ____ N.Y.S.2d ____ (4th Dep't 1981). *Staffen* applied the one-year-and-ninety-day period of § 50-i of the General Municipal Law, a result we had rejected in *Quinn*. The Appellate Division was not asked to determine whether § 214(2) should apply to § 1983 claims on Judge Mishler's rationale that the United States Constitution can be considered a statute within the meaning of § 214(2).

From this state of the decisional law a conclusion is not easily drawn. What must be kept in mind is the nature of our task as distinguished from that of the state courts. The courts of New York provide authoritative guidance on the proper construction of state statutes, including statutes of limitations. But determination of an appropriate state limitations period applicable to a federal cause of action is "a matter of federal law." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 (1966). We would not be applying federal law if we automatically deferred to New York's view, whether expressed by its courts or its legislature, as to which limitations period the state thought was appropriate for a § 1983 claim.[6] Our task is

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6 When a state legislature enacts a statute of limitations explicitly applicable to a federal cause of action, a federal court must determine whether the state statute impairs the achievement of federal objectives, for example, by prescribing an unduly short limitations period, and whether the state statute discriminates against federal claims. *See Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945) (federal court may not enforce state statute of limitations enacted specifically to cover claims founded on any federal law that lacks a period of limitations), *aff'd mem.*, 327 U.S. 757 (1946); *Caldwell v. Alabama Dry Dock & Shipbuilding Co.*, 161 F.2d 83 (5th Cir. 1947) (state statute of limitations expressly covering claims founded on Fair Labor Standards Act of 1938 is unconstitutional). When a state court

to examine the limitations periods that New York has prescribed for various state causes of action and then select for § 1983 claims, as a matter of federal law, the limitations period for an "analogous" state cause of action. *Board of Regents v. Tomanio, supra,* 446 U.S. at 483-84.

Having considered the alternatives, we conclude that a state law claim founded upon a statute is the appropriate analogy for a § 1983 claim. New York's highest court has characterized § 214(2) as applicable to "actions for wrongs not recognized in the common or decisional law." *State v. Cortelle, supra,* 38 N.Y.2d at 86, 378 N.Y.S.2d at 656. While some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is "significantly different from" state torts, *Monroe v. Pape, supra,* 365 U.S. at 196 (Harlan, J., concurring). And many § 1983 claims, such as Pauk's allegation of denial of tenure for exercising First Amendment rights, have no common law antecedents. A § 1983 claim founded on the Constitution, even if not within the category of claims to which § 214(2) precisely applies as a matter of state law, is sufficiently analogous to such claims to make the limitations period of § 214(2) appropriate as a matter of federal law.

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determines that a state statute of limitations is applicable to a federal cause of action, a federal court must make an even more refined analysis. While recognizing the state court's authoritativeness in construing the state statute of limitations, the federal court must bear in mind that when the state court determines whether a particular state statute of limitations applies to a federal claim, the state court is deciding a question of federal law. This question, involving characterization of the federal claim in order to determine which state limitations period most appropriately applies, may be decided by a state court, *see Testa v. Katt,* 330 U.S. 386 (1947), but the state court decision cannot preclude a federal court's more authoritative decision on matters of federal law.

Selecting the limitations period of § 214(2) satisfactorily accommodates relevant federal and state interests. Section 214(2) manifests New York's view of an appropriate limitations period that clearly applies to § 1983 suits founded on other federal statutes. *See Maine v. Thiboutot*, ____ U.S. ____ (June 25, 1980). The interests in uniformity, which we have previously emphasized, *e.g.*, *Quinn v. Syracuse Model Neighborhood Corp.*, *supra*, are well served by applying § 214(2)'s limitations period to all § 1983 suits. Moreover, the three-year limitations period is consistent with the broad remedial purposes of § 1983. The six-year period of § 213 (1) is considerably longer than the relatively short period of one year and ninety days, which the New York legislature has recently attempted to apply to some § 1983 suits, Gen. Mun. Law § 50-k(6). Finally, borrowing the three-year period of § 214(2) serves the useful purpose of maintaining continuity in the application of that statute's limitations period to § 1983 suits. It would be preferable if Congress would end the uncertainty that still exists in several states by legislating a uniform federal statute of limitations. Until that happens, we hold that the three-year limitations period of § 214(2) applies to § 1983 suits in New York.

The judgment is affirmed.

SOFAER, *District Judge, concurring:*

I concur in Judge Newman's thorough opinion, but write separately to emphasize that the limitations period of CPLR § 214(2) is not merely, as the Court holds, an appropriate provision to borrow for actions brought pursuant to 42 U.S.C. § 1983, but rather is squarely applicable to such suits.

The three-year period of section 214(2) applies to "an action to recover upon a liability. . . created or *imposed* by statute. . . ." N.Y. C.P.L.R. § 214(2) (emphasis added). The issue, therefore, is not merely whether section 1983 creates liability, but also whether it is a statute that imposes liability. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979), did indeed hold that section 1983 does "not provide for any substantive rights"; as the Court put it, "one cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Id.* at 617. But the issue before the Court in *Chapman* was whether, for the jurisdictional purposes of 28 U.S.C. § 1343, section 1983 was a statute securing "equal rights" or "civil rights"—not, as in the present context, whether liability in a federal civil rights action is imposed by statute. The Court, in fact, recognized that section 1983 "served to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by § 1 of the 1866 Act." *Id.* (footnote omitted). In other words, although the Constitution creates the substantive right asserted in a section 1983 action (other than one brought pursuant to *Maine v. Thiboutot,* 100 S. Ct. 2502 (1980)), it is section 1983 that imposes civil liability and provides a cause of action in federal court. Although some authority exists for the proposition that suits against state officials for violations of constitutional rights may be brought directly under the Constitution, that is hardly a proposition so well-established as to render section 1983 mere procedural surplusage. Moreover, even if the Supreme Court were to hold that such an action were available in some circumstances, the state-

ment that section 1983 is a liability-imposing statute would nonetheless remain true, for section 1983 would still constitute Congress's independent authorization of suit and would constitute sole authorization of suit in circumstances in which no direct action was available. Consequently, a section 1983 action falls precisely within the language of section 214(2): it is a suit in which liability is imposed by statute. *Clark v. Water Commissioners,* 148 N.Y. 1, 108 N.Y.S. 427 (1895), and *State v. Cortelle Corp.,* 38 N.Y.2d 83, 378 N.Y.S.2d 654 (1975), fortify this construction, because they are based upon the rationale that the statutes involved there neither created nor imposed any liability.

The recent decision in *Staffen v. Rochester,* 80 A.D.2d 16, 18-19 (4th Dep't 1981), incorrectly reads *Chapman* as holding that section 1983 is not a statute that creates liability. *Staffen* did not address the possibility that section 1983 could be viewed as a statute *imposing,* though not *creating,* liability. Moreover, the New York courts would not adhere to the proposition that section 1983 imposes no liability, in the face of an authoritative federal decision otherwise construing *Chapman* (a federal decision) and the nature of section 1983 (a federal statute).

Given that we view section 1983, even in light of *Chapman,* as a statute that imposes liability, we need not reach Judge Mishler's sensible but difficult conclusion that the Constitution is a "statute" for purposes of section 214(2). That position has implicitly been rejected by the New York courts, to which we are supposed to look for guidance as to the appropriate statute of limitations. A precise reading of *Chapman* spares us the need to engage in policy analysis that might suggest we are selecting a limitations period that we find convenient, rather than one squarely justified by state-law analogies.

APPENDIX B

Opinion of the District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

EDGAR PAUK,

Plaintiff,

- against -

79 C 2250

THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, et al.,

MEMORANDUM OF DECISION AND ORDER OCT 14, 1980

Defendants.
----------x

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MISHLER, District Judge

In this action plaintiff seeks monetary and injunctive relief pursuant to 42 U.S.C. § 1983 for the deprivation under color of state laws of rights secured to him by the Constitution of the United States. Plaintiff, a former professor at Queens College, alleges that the decision by college and City Education officials to deny him reappointment with tenure was in retaliation for his participation in union and political activities on campus and, therefore, constituted a violation of his First Amendment right of free speech.

Presently before the court is defendants' motion pursuant to Fed.R.Civ.P. 12(b)(1) and (6) to dismiss the complaint on the grounds that the action is barred by the applicable statute of limitations and the complaint fails to state a claim upon which relief can be granted. In the alternative, defendants move for an order pursuant to Fed.R.Civ.P.

56(b) granting summary judgment in favor of defendants.

From 1967 to 1970 plaintiff served as a lecturer at Queens College of the City of New York. In the fall of 1970 he became an assistant professor and remained in the position until August 31, 1976, when his employment was officially terminated because of his failure to obtain reappointment with tenure for the academic year beginning in September 1976. Tenure is granted to an individual who has served in certain positions for a period of five years and has been re-appointed for a sixth consecutive year. If the individual fails to gain reappointment his employment is automatically terminated.

Plaintiff was considered for reappointment with tenure in September 1975. His candidacy was evaluated by various college committees and subcommittees. On October 24, 1975 Joseph S. Murphy, the college president,

wrote a letter to plaintiff informing him that having received from the appropriate committee a negative recommendation on the plaintiff's reappointment with tenure he was not including plaintiff's name among those recommended for tenure to the Board of Higher Education (now the Board of Trustees of the City University of New York). The president's letter invited plaintiff to submit to him an appeal of the decision by October 31, 1975. In this appeal plaintiff set forth his academic qualifications for reappointment and charged that it was plaintiff's union activities which brought about the negative recommendation. On November 24, 1975 plaintiff received a letter from President Murphy denying the appeal. In addition, on November 24, 1975 plaintiff received a letter from the Provost of the College, Nathaniel Siegel, noting the termination of plaintiff's employment at the

college as of August 31, 1976.

Defendants assert that the decision of the president, of which plaintiff was notified on November 24, 1975, was a final decision and that the sole mechanism available for challenging the decision was the grievance mechanism contained in the collective bargaining agreement between the Board of Higher Education and the Professional Staff Congress. On January 7, 1976 a grievance was filed on plaintiff's behalf pursuant to Article 20 of the applicable collective bargaining agreement challenging the denial of his candidacy for reappointment with tenure. On February 10, 1976, however, the grievance was withdrawn.

On January 15, 1976 plaintiff commenced an Article 78 proceeding in New York State Supreme Court, claiming that the combined length of his employment as a lecturer and a professor at Queens College automatically

entitled him to reappointment with tenure. Plaintiff raised no constitutional issues in the state court action. The Article 78 petition was granted on September 28, 1977, Pauk v. Board of Higher Education, Index No. 01316/76 (Sup. Ct. N.Y. Co., Sept. 28, 1977). However, on June 6, 1978 the Appellate Division reversed the prior decision, Pauk v. Board of Higher Education, 62 App. Div. 2d 660, 406 N.Y.S.2d 46 (1st Dept. 1978), aff'd, 48 N.Y. 2d 930, 425 N.Y.S.2d 92 (1979).

On August 31, 1979, exactly three years after the termination date of plaintiff's employment contract and approximately three years and nine months after plaintiff received notice of termination, plaintiff filed the complaint in this action seeking redress under 42 U.S.C. § 1983 for alleged deprivation of constitutional rights. Defendants claim that the action is barred by the applicable statute of limitations. The court agrees.

Discussion

Congress has not specified a statute of [limitations] for § 1983 actions. In the absence of a specific federal statute of limitations, federal courts "borrow" the most appropriate state statute of limitations. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716 (1975); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974). Federal courts sitting in New York have repeatedly held that the New York statute of limitations applicable to § 1983 actions is the three-year statutue of limitations found in N.Y.C.P.L.R. § 214(2) which applies to actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." Meyer v. Frank, 550 F.2d 726 (2d Cir.), cert. denied, 434 U.S. 830, 98 S.Ct. 112 (1977); Kaiser v. Cahn, supra; Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971); Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963);

Bomar v. Keyes, 162 F.2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947).

However, plaintiff argues that the recent Supreme Court decision in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S. Ct. 1905 (1979), requires that C.P.L.R. § 214(2) now be held inapplicable to § 1983 actions. In Chapman, the Supreme Court found that § 1983 is not a statute that secures "equal rights" or "civil rights" within the meaning of the jurisdictional statute, 28 U.S.C. § 1343, because § 1983 does not provide any substantive rights, but provides only a remedy. Because § 1983 has been found to grant no substantive rights, it is argued, it does not create or impose a liability for which C.P.L.R. § 214(a) [sic] would provide the limitations period.

The question of the continued validity in light of Chapman of the application of C.P.L.R. § 214(2) to § 1983 actions has in

prescribed, N.Y.C.P.L.R. § 213(1), the Second Circuit until recently had not been confronted with a case requiring resolution of the limitations question. See Leonhard v. United States, No. 79-6218 (2d Cir. August 28, 1980); Taylor v. Mayone, No. 79-2078 (2d Cir. June 27, 1980); Cullen v. Margiotta, 618 F.2d 226, 228 n.3 (2d Cir. 1980).

Most recently, however, in Singleton v. New York City, No. 79-7628 (2d Cir. September 25, 1980) the Second Circuit was squarely confronted with the issue of whether New York's three-year or six-year statute of limitations applied to § 1983 actions. In Singleton, plaintiff filed his § 1983 action seeking damages for false arrest and assault more than three years after his cause of action occurred, but less than six years after accrual, making determination of the applicable statute of limitations crucial to

recent months gained the attention of the Second Circuit. In Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 449 n. 6 (2d Cir. 1980), the Second Circuit first noted the possible inapplicability of C.P.L.R. § 214(2) to suits arising under § 1983, citing the New York Court of Appeals' decision in State v. Cortelle Corp., 38 N.Y.2d 83, 85, 378 N.Y.S.2d 654, 655, 341 N.E.2d 223, 224 (1975) where Judge Breitel stated that C.P.L.R. § 214 does not apply to "[s]tatutory provisions which provide only additional remedies or standing [but] do not create or impose new obligations." While noting in dictum in Quinn and in subsequent cases citing Quinn the possible inapplicability of N.Y.C.P.L.R. § 214(2) to § 1983 actions, and suggesting, in the alternative, the possible applicability of New York's six-year statute of limitations which governs actions for which no other specific limitation is

the existence of the action.

The Second Circuit found that N.Y.C.P. L.R. § 213(1), the six-year statute of limitations, was not applicable to Singleton's § 1983 action and that the three-year limitation found in C.P.L.R. § 214(2) remained the applicable limitations period.[/1] The court reasoned that § 213(1) was meant to govern actions for equitable relief, not actions for damages,[/2] and has been so interpreted by New York State courts. See Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co., 270 N.Y. 86, 200 N.E.589 (1936). In deciding whether Singleton's § 1983 claim "[f]it into the state scheme," Klein v. Bower, 421 F.2d 338, 344 (2d Cir. 1970), the court found that since Singleton sought only damages and no equitable relief § 213(1) "must be eliminated as a statute that might be applied." Singleton v. City of New York, supra, No. 79-7628, slip op. at 5815. In

thus eliminating § 213(1), the "only other relevant state statute of limitations," the court found that § 214(2) still applied, presumably because it remained the "more appropriate" state statute of limitations in spite of the Supreme Court's reinterpretation of § 1983 in Chapman.

Since Singleton did not foreclose the application of N.Y.C.P.L.R. § 213(1) to § 1983 actions where equitable relief is sought, this court must make its own determination whether that section might be applied in the case presently before us, where both damages and equitable relief are sought. We find that § 213(1) is not applicable. In support of this finding we look to the reasoning in prior cases in the Second Circuit in which the court rejected applicability to federal claims of particular state statutes of limitations.

In Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977), the Second Circuit rejected the argument that N.Y.C.P.L.R. § 215(3) which provides a one-year period for common law intentional torts is applicable to a Bivens claim brought directly under the Constitution. The court reasoned that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserved a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Regan v. Sullivan, supra, 557 F.2d at 304 quoting Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962) quoting Monroe v. Pape, 365 U.S. 167, 196, 81 S. Ct. 473, 488 (1961) (concurring opinion).

Similarly, in Quinn v. Syracuse Model Neighborhood Corp., supra, the Second Circuit

rejected application to § 1983 actions of New York's one-year 90-day statute, N.Y. Gen.Municipal Law § 50-i, which governs actions against municipalities, stating "[t]o create different limitations periods for two similarly situated classes of defendants would create a distinction without a difference, and would engender unnecessary confusion for litigants and judges alike." Quinn v. Syracuse Model Neighborhood Corp., supra, 613 F.2d at 449. The reasoning in Quinn was adopted by the Second Circuit in Taylor v. Mayone, supra, No. 79-2078 (2d Cir. June 27, 1980), to find inapplicable to § 1983 actions New York's one-year limitations period applicable to actions against sheriffs and other local officers.

In light of the reasoning of the Second Circuit in Regan and Quinn, this court finds that application to § 1983 actions of state

statutes of limitations, the applicability of which depends upon distinctions created to advance state interests or to accommodate the nature of actions arising under state law should be rejected. In this instance, application of a specific state statute of limitations should not be made to depend upon the plaintiff's choice between a legal or equitable remedy. While such a distinction may accomplish a meaningful purpose in the context of the various causes of action arising under state law, if applied to § 1983 actions, such a distinction would create confusion for both litigants and judges and would hamper rather than advance the important purpose of § 1983 to enforce more perfectly federal limitations on state actions. Thus, we find that C.P.L.R. § 213(1) must be eliminated as a statute that might be applied in this case. N.Y.C.P.L.R. 214(2) remains

the most appropriate statute of limitations.

Even were this court to find that C.P.L.R. 213(1) might be applicable to § 1983 actions in which equitable relief is sought, we would find that C.P.L.R. 214(2), governing actions to recover upon a liability created or imposed by statute would still be the statute of limitations "most appropriate" for application to § 1983 actions notwithstanding the Supreme Court's statement in Chapman that § 1983 creates only a remedy and no substantive rights.

In inquiring as we must where an action arising under a statute such as § 1983 would fit into the state scheme, Klein v. Bower, supra, 421 F.2d at 334, we are instructed by the New York courts that when a cause of action arises under a statute which creates only standing or a remedy and no substantive rights, a determination of which statute of limitations is applicable is to be made by

reference to the source of the right or liability. See State v. Cortelle Corp., supra; Potter v. Walker, 276 N.Y. 15, 11 N.E. 335 (1937); Binelander v. Town of Islip, 199 N.Y.S.2d 561, 10 A.D. 2d 170 (2d Dept. 1960). The rights for which § 1983 provides a remedy for their deprivation derive from only two sources: the Constitution and federal laws.

An action arising under a federal statute clearly falls within the definition of C.P.L.R. 214(2) as an action to recover upon a liability created by statute. As to whether the Constitution may be regarded as a statute, there is no doubt that the Constitution itself creates rights and liabilities. Turpin v. Maillet, 579 F.2d 152 (2d Cir.), vacated and remanded, 439 U.S. 988, 99 S. Ct. 586 (1978), on remand, 591 F. 2d 426 (2d Cir. 1979); Bivens v. Six Unknown

Named Agents of Federal Bureau of Narcotics 403 U.S. 388, 91 S. Ct. 1999 (1971). For the proposition that we may view the Constitution as a "mere statute" for the purpose of C.P.L.R. § 214(2), see Clark v. Water Comrs. 148 N.Y. 1, 42 N.E. 414 (1892), we find support in the Second Circuit's opinion in Regan v. Sullivan, supra. In that case, despite a warning from the district court that an action founded upon the Constitution is not "except in the most expansive sense" created by statute, Regan v. Sullivan, 417 F. Supp. 399, 403 (E.D.N.Y. 1976), the Second Circuit found that the three-year limits of C.P.L.R. § 214(2) or the six-year limits of C.P.L.R. § 213(1) [3] applied to suits against federal officers brought directly under the Constitution. [4]

In holding that New York's three-year

statute of limitations applies in this case, the question of when plaintiff's cause of action accrued becomes determinative. Plaintiff argues that the cause of action for wrongful discharge from employment accrued not on November 24, 1975, when he was notified of discharge, but on August 31, 1976, the date of actual termination of his contract term, making timely this action which was filed on August 31, 1979, exactly three years later.

While the appropriate statute of limitations for federal actions is borrowed from state law, the federal rule fixes the time of accrual of a right of action. Kaiser v. Cahn, supra, 510 F.2d at 285. Under the federal rule a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Young v. Clinchfield

Railroad Company, 288 F.2d 499, 503 (4th Cir. 1961).[5] Plaintiff in this case became aware of the injury caused to him by alleged unfairness in the evaluation of his application for tenure and his action accrued when he received final notice of termination of employment on November 24, 1975. Accord, Brogan v. Wiggins School District, 588 F.2d 409 (10th Cir. 1978); Bireline v. Segondollar, 567 F.2d 260 (4th Cir. 1977). Plaintiff misplaces reliance on cases holding that a claim of employment discrimination under Title VII accrues upon actual discharge from employment, Ricks v. Delaware State College, 609 F.2d 710 (3rd Cir. 1979); Bonhow v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821, 99 S. Ct. 87 (1978). These cases involved the 180-day time limit within which a plaintiff must file an administrative claim with the

appropriate agency. In these cases the court reasoned that if this time limit were calculated not from discharge, but from notice, in most cases the claim would have to be filed before expiration of the term of employment in order to survive the statute of limitations. The conciliatory policy underlying Title VII legislation is not advanced by forcing commencement of legal proceedings before actual discharge. See Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 470-73, 95 S. Ct. at 1725-26.

Plaintiff's final argument is that the statute of limitations in the § 1983 action was tolled during the pendency if the proceeding commenced by plaintiff in New York State Court under N.Y.C.P.L.R. Article 78. In the recent case, Board of Regents of the University of the State of New York v. Tomanio,

_____ U.S. _____, 100 S. Ct. 1790 (1980), the Supreme Court addressed this precise issue. The Court held applicable New York's tolling rule which does not permit tolling during the period in which a litigant pursues a related but independent cause of action. On the basis of the Supreme Court's decision, we find that the statute of limitations was not tolled in this case and, therefore, the action is barred by the three-year statute of limitations.

Defendants' motion to dismiss the complaint is granted and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the defendants and against the plaintiff dismissing the complaint.

/s/ Jacob Mishler
U. S. D. J.

APPENDIX C

Order of the Court of Appeals for the Second Circuit Denying Petition For Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of September, one thousand nine hundred and eighty-one.

80-9018

----------x

EDGAR PAUK,

Plaintiff-Appellant,

-v-

THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants-Appellees.

----------x

(Filed September 11, 1981, A. Daniel Fusaro, Clerk)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Edgar Pauk,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing be DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
A. Daniel Fusaro
Clerk

by /s/_____
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX D: Relevant Constitutional and Statutory Provisions

AMENDMENT XIV.-CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; to establish a will; by corporation against director, officer or stockholder; based on fraud

The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law;

2. an action upon a contractual obligation or liability express or implied, except as provided in article 2 of the uniform commercial code;

§ 214. Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice; to annul a marriage on the ground of fraud

The following actions must be commenced within three years:

1. ...

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;

Opposition

Office - Supreme Court, U.S.
FILED
FEB 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1091

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

EDGAR PAUK,

Petitioner,

-against-

THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 81-1091

IN THE
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EDGAR PAUK,

Petitioner,

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Whether a lack of uniformity in the statutes of limitations applied by federal courts in civil rights actions is a necessary and acceptable result of the decisions of this Court?

2. Whether the instant case is inappropriate for review by this Court since petitioner's action is barred under any state limitations period arguably applicable to this action?

3. Whether the Court of Appeals was correct in applying the three year statute of limitations provided in CPLR 214(2)?

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STATEMENT OF THE CASE

The petitioner seeks to have this Court review by writ of certiorari an order of the United States Court of Appeals for the Second Circuit, entered on July 22, 1981, which affirmed the dismissal of his complaint. Petitioner filed a timely motion for rehearing in banc, which was denied in an order dated September 11, 1981. Petitioner instituted this action pursuant to 42 U.S.C. §1983, alleging deprivation under color of state law of rights secured to him by the Constitution of the United States in that he was denied tenure as a college professor because of the exercise of his First Amendment right of freedom of speech by engaging in union activity. On October 14, 1980, the United States District Court for the Eastern District of New York dismissed petitioner's

action as untimely because it was instituted more than three years from the time of its accrual. The United States Court of Appeals affirmed with an opinion (Pauk v. Board of Trustees, 654 F. 2d 856 (2d Cir. 1981). Respondents rely on the facts presented in the Petition for a Writ of Certiorari and in the opinion of the Court of Appeals (Petition for a Writ of Certioari, Appendix A).

REASONS FOR DENYING A WRIT OF CERTIORARI

POINT I

THIS COURT HAS DIRECTED FEDERAL COURTS TO APPLY THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS TO FEDERAL CIVIL RIGHTS ACTIONS PURSUANT TO 42 U.S.C. §1983, STATING THAT UNIFORMITY IS NOT A CONSIDERATION IN THIS AREA.

Petitioner argues that a writ of certiorari should be granted since "[t]his case presents the Court with an opportunity to settle the confusion, uncertainty and

lack of uniformity which exists with respect to the appropriate statute of limitations in civil rights cases under 42 U.S.C. 1983." (Petition for a Writ of Certiorari, p. 5). We submit that this Court, in its numerous decisions directing federal courts to apply the most appropriate state statute of limitations to civil rights actions in federal court, has definitively settled the question of the necessity for uniformity in this area in favor of non-uniformity. See, Board of Regents v. Tomanio, 446 U.S. 478 (1980); Robertson v. Wegmann, 436 U.S. 584 (1978); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). "The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions." Board of Regents v. Tomanio, supra, 446 U.S.

at 482. In Robertson v. Wegmann, supra, 436 U.S. at 594, this Court held that

> "whatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the area to which §1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be uniformity on those issues."

In Johnson v. Railway Express Agency, supra, 421 U.S. at 464, this Court stated that there is nothing

> "peculiar to a federal civil rights action that would justify special reluctance in applying state law. Indeed, the express terms of 42 U.S.C. §1988 suggest the contrary is true."

Furthermore, in United Auto Workers v. Hoosier Corp., 383 U.S. 696, 706 (1966), this Court, while recognizing that the characterization of an action for the purpose of selecting the appropriate statute of limita-

tions provision is ultimately a question of federal law, directed federal courts to look to characterizations provided by state law unless that characterization is unreasonable or inconsistent with national policies. The principles espoused by this Court in the cases discussed above necessarily result in a variety of limitations periods being applied to civil rights actions even when a federal court applies the limitations periods of a single state, since a state may characterize a civil rights action differently depending upon the facts under which it arises.

As we will demonstrate below, the Court of Appeals properly applied the three year statute of limitations, as set forth in the applicable New York State law, to the facts in the instant case.

POINT II

THE INSTANT CASE IS INAPPROPRIATE FOR REVIEW ON THE QUESTION OF WHAT IS THE ANALOGOUS STATE STATUTE OF LIMITATIONS APPLICABLE IN A §1983 ACTION, SINCE PETITIONER IS BARRED PURSUANT TO ANY STATE LIMITATIONS PERIOD APPLICABLE TO ANY REASONABLE CHARACTERIZATION OF THIS ACTION.

(1)

The Court of Appeals was correct in holding that petitioner's cause of action accrued on November 24, 1975, the date on which he knew of his alleged injury, the improper denial of tenure. In Delaware State College v. Ricks, 449 U.S. 250 (1980), a case with facts identical for accrual purposes to those in the instant case, this Court held that the date of accrual of a claim, alleging that the plaintiff was denied tenure because of his national origin in violation of 42 U.S.C. §1981 and 42 U.S.C. §2000e, was the date on which

the plaintiff had received notice of the negative tenure decision and not the date of his actual termination. See also, Chardon v. Fernandez, ___ U.S. ___, 102 S. Ct. 28 (1981).

Although petitioner here argued that his denial of tenure was not final because the Board of Trustees had not specifically acted to deny him tenure, the Court of Appeals correctly decided that New York law did not require that the Board of Trustees review negative recommendations of tenure, absent petitioner's resort to procedures required in the collective bargaining agreement governing the employment relationship. See, Pauk v. Board of Trustees, supra, 654 F. 2d at 860 (Appendix to Petition, p. A-7). Thus, the decision to deny petitioner tenure was final for accrual purposes when he was informed by letter dated November 24, 1975,

that, upon consideration of his appeal, tenure was denied.

(2)

Since petitioner's action was instituted on August 31, 1979, more than three years and nine months after its accrual date, his action must be governed by an analogous state statute of limitations of more than that period in order for his action to be timely. However, as the Court of Appeals correctly decided, the two limitations periods which petitioner proposes, i.e., the six year period for contract (213[2]) and the six year period for actions for which no statute of limitations is provided (CPLR 213[1]), are not applicable under the facts of the instant case.

Petitioner argues that, had he brought his action in state court, it would have been characterized as contractual and would have

been controlled by the six year period governing contract actions (CPLR 213[2]). However, under New York law, when a contract simply incorporates pre-existing obligations, independent of the contract and imposed by the laws of the jurisdiction, the applicable limitations period is not that applied to contracts, but rather the period appropriate to the nature of the underlying cause of action. Union Bank of Switzerland v. HD Equities, Inc., 423 F. Supp. 927 (S.D.N.Y. 1976); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 146-147 (1953), 11 NE 2d 421, 422-423. It is clear, then, that petitioner's contention that the six year period pursuant to CPLR 213(2) ought to be applied is totally without merit.

In the alternative, petitioner argues that CPLR 213(1), providing for a six year limitations period for actions "for which

no limitation is specifically prescribed by law," ought to be applied.* In support of his contention, petitioner cites only one case, Clark v. Water Commissioners, 148 N.Y. 1 (1895), 42 N.E. 414, a case sui generis on its facts and completely inapplicable to actions for violations of civil rights se-

*Section 213(1) is commonly known as the residual statute of limitations and is normally applicable in cases where only equitable relief is sought. See, Singleton v. City of New York, 632 F. 2d 185 (2d Cir. 1980). In the instant case, petitioner seeks both legal and equitable relief, i.e., reinstatement and damages totalling $550,000. The Second Circuit has held that when "a suit in aid of a federally-created right is brought seeking both legal and equitable relief, 'equity will withhold its remedy if the legal right is barred by the local statute of limitations.' Russell v. Todd, 309 U.S. 280, 289 (1940)." Williams v. Walsh, 558 F. 2d 667 (2d Cir. 1977). Even when only the equitable remedy of reinstatement is sought, by the mere fact that the plaintiff could have sought damages under section 1983, he is not asserting "a federal right for which the sole remedy is in equity." Swan v. Board of Higher Education, 319 F. 2d 56, 59-60 n. 5 (2d Cir. 1963).

cured by the Constitution and laws of the United States.* First, Clark concerns a provision of the New York State Constitution, not the Federal Constitution and laws enacted by Congress for the protection of civil rights. Second, New York courts have never applied the reasoning of Clark nor the residual statute of limitations provided by CPLR 213(1) to civil rights actions pursuant to 42 U.S.C. §1983. See, Staffen v. City of Rochester, 80 AD 2d 16

*Clark v. Water Commissioners, supra, 148 N.Y. 1, 42 N.E. 414, applied the predecessor of CPLR 213(1) to a cause of action arising under a statute providing for the obtaining of compensation in the context of condemnation proceedings because the statute did not provide a statute of limitations. The residual limitations period was not applied because the underlying liability was grounded in the state constitution provision. See, Trippe v. Port of N.Y. Auth., 14 NY 2d 119 (1964), 198 NE 2d 585, applying a one year limitations period to an action based on the same constitutional provision as in Clark because the statute providing the remedy so directed.

(4th Dept., 1981), 437 N.Y.S. 2d 821; Pitt v. City of New York, (Sup. Ct., N.Y. Co.), New York Law Journal, November 18, 1981, p. 4, col. 4.

Since there is no reasonable basis for applying a limitations period longer than the three year period of CPLR 214(2), petitioner's complaint was correctly dismissed. The only question remaining for review by this Court is whether the three year limitations period of section 214(2) or a lesser period is the most appropriate New York statute of limitations to be applied. Any of these limitations periods would require dismissal of the complaint. Since this is purely a question of state statutory construction, it should be reviewed by this Court only in a case where it would bear upon the outcome.

POINT III

THE COURT OF APPEALS WAS CORRECT IN APPLYING THE THREE YEAR STATUTE OF LIMITATIONS PERIOD PURSUANT TO CPLR 214(2).

CPLR 214(2) provides a three year statute of limitations for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute." Petitioner argues that, in light of Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), holding that section 1983 does not secure any rights, but merely provides a remedy, and State v. Cortelle, 38 NY 2d 83 (1975), 341 NE 2d 223, holding that section 214(2) is inapplicable to statutes which merely provide additional remedies or standing for pre-existing wrongs, section 214(2) cannot be applied to section 1983 actions because section 1983 does not create or impose

a liability.*

We submit that the Court of Appeals was correct in its application of section 214(2) to this action since section 1983, though it creates no rights, does create or impose a liability upon anyone acting under color of state law who violates rights, privileges, or immunities secured by the Constitution or laws of the United States. Without section 1983, although petitioner would have a right, no legal liability or obligation would exist restraining a potential defendant from violating that right. "If a claim would not exist but for a statute, the claim

*Chapman does not deal with the question of what statute of limitations applies in a section 1983 action, but rather of whether section 1983 can be considered a statute securing civil rights for the purpose of supporting jurisdiction pursuant to 28 U.S.C. §1343(4). This Court held that it did not secure any rights, but merely provided a remedy.

is upon 'a liability * * * created or imposed by statute', and carries a three year statute of limitations (CPLR 214, subd. 2)." Klimczak v. Connrex Corp., 49 AD 2d 1031, 1032 (4th Dept., 1975); 374 N.Y.S. 2d 84. See also, Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287 (1936); 200 N.E. 324; People v. Duggan, 30 AD 2d 736 (3rd Dept., 1968), 291 N.Y.S. 2d 582.

State v. Cortelle Corp., supra, 38 NY 2d 83, 341 NE 2d 223, holding section 214(2) inapplicable to statutes which merely provide additional remedies or standing for recognized pre-existing wrongs, is not to the contrary. In Cortelle, the statutes, to which the Court refused to apply section 214(2), granted the Attorney General standing to sue in certain cases where fraudulent practices are alleged and provided additional remedies.

The Court held that the statutes

> "create no new claims but only provide particular remedies and standing in a public officer to seek redress on behalf of the State and others. Moreover, the kind of wrong the Attorney General seeks to redress is not a new one to the decisional law but a now rather old and common type of fraud." State v. Cortelle, supra, 38 NY 2d at 86, 341 NE 2d 223, 225.

In the instant case, CPLR 214(2) applies because, prior to the enactment of section 1983, there was no remedy for the violation of the rights protected by the statute nor was there a pre-existing legal wrong.

Petitioner also argues that a conflict exists between the Fifth Circuit's holding in McMillian v. City of Rockmart, 653 F. 2d 907 (5th Cir. 1981), and the Second Circuit's holding in the instant case. However, these holdings do not, in fact, present any con-

flict since they are construing statutes o
limitations completely distinguishable on
their face. In McMillian, the Court, in li
of Chapman v. Houston Welfare Rights Org.,
supra, 441 U.S. 600, which held that secti
1983 secured no rights, refused to apply a
Georgia statute of limitations applicable
to all suits for the enforcement of rights
accruing to individuals under statutes.
McMillian v. City of Rockmart, supra, 653
2d at 910. However, section 214(2), by its
express wording, is applicable to causes o
action to recover upon liabilities create
imposed by statute. Since the McMillian s
ute applies to rights accruing under stat
and no rights accrue under section 1983,
appears the Court was correct in not appl
that period. This holding is entirely con
tent with that of the instant case, in wh
the statute applies to liabilities.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 11, 1982.

Respectfully submitted,

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